74-1245

Supreme Court, U. S.
FILED
APR 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-.....

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Liberty Mutual Insurance Company (herein "Liberty" or "the Company") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 11, 1975. (App. p. A1).

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. A2-A18) is not yet officially reported. The opinion of the District Court (App. pp. A19-A48) is reported at 372 F. Supp. 1146 and its memorandum order, denying the Company's motion for reconsideration (App. pp. A49-A51), is reported at 372 F. Supp. 1163.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Third Circuit (App. pp. A1-A48), affirming the judgment of the United States District Court for the Western District of Pennsylvania (App. pp. 19-51), were both issued on February 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does an employer's exclusion of coverage for pregnancy related disabilities from an employee disability income protection plan constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

STATUTE INVOLVED

The relevant portion of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), is set forth below:

* * * * *

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

* * * * *

The relevant portions of the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR, Chapter XIV, Part 1604, Sections 1604.9 and 1604.10, effective March 30, 1972, are set forth below:

* * * * *

> Sec. 1604.9 Fringe Benefits.—(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.
>
> (b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits. * * *

* * * * *

> Sec. 1604.10 Employment Policies Relating to Pregnancy and Childbirth.—(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. * * *

* * * * *

STATEMENT OF THE CASE

This case presents a significant question of first impression in the administration of the Civil Rights Act of 1964, as amended, which was raised, but not resolved, in this Court's recent decision in *Geduldig* v. *Aiello*:[1] whether a private employer's distinctions in coverage under an employee income protection plan, based upon pregnancy, constitutes sex discrimination under Title VII, particularly when, under *Aiello*, the identical exclusion by a State, under its plan, was found to not constitute discrimination based on sex.

---

1. 417 U.S. 484 (1974).

Liberty Mutual is a casualty insurance company which maintains offices throughout the country. Both men and women are employed in the claims departments of these offices in what the Company terms a "technical" capacity. Two of these technical claims department employees in Pittsburgh, Pennsylvania, filed charges with the Equal Employment Opportunity Commission in 1971 accusing Liberty of engaging in proscribed sex discrimination.[2] Upon issuance of a right to sue letter to plaintiffs, they commenced an action in the district court, alleging, insofar as is relevant herein, that Liberty discriminated against a nationwide class of all female employees working in a technical capacity in all Liberty claims offices, with respect to the exclusion of coverage for pregnancy from its employee disability income protection plan.

Liberty provides its employees with an income protection plan as a fringe benefit. Pursuant to this plan, an employee out of work eight calendar days due to an illness requiring the care of a physician, receives insurance benefits for the duration of disability, which continues for a period of up to age 65 if the employee has been with the Company for more than five years, or for a maximum two-year period if with the Company less than five years. In addition, employees receive a salary supplement for as many weeks as they have completed years of service with the Company. The plan does not cover leaves or temporary absences occasioned by pregnancy.[3]

Upon the basis of the foregoing, which was adduced by means of discovery, plaintiffs moved for summary judgment with respect to liability. The district court granted that motion on January 9, 1974 and issued an interlocutory order finding that Liberty violated the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., with respect to application of its income protection plan to pregnant employees (App. pp. 19-48). Thereafter, Liberty moved the district court to reconsider its order in light of the opinion of the United States District Court for the Northern District of Georgia in *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (1973). The district court denied this motion on February 20, 1974, but at the same time certified its findings as a final order (App. pp. 49-51), thus enabling Liberty's appeal to the Third Circuit, which on February 11, 1975, affirmed the district court's decision (App. pp. A2-A18).[4]

2. It is noteworthy that, at the time the charges were filed, the Company's policy of excluding coverage of pregnancy under its disability policy, was *lawful*, even in the view of the E.E.O.C. It was only subsequent to the charges that the Commission, on March 30, 1972, reversed its position and, via its guidelines, condemned the practice it previously stated was not unlawful.

3. Nor does it cover intentionally self-inflicted injuries, suicide attempts, accidents arising out of employment (for which workmen's compensation benefits would accrue), nor disabilities arising out of war.

REASONS FOR GRANTING THE WRIT

The Federal Judiciary Requires Guidance Concerning the Effect to Be Accorded This Court's Decision in Geduldig v. Aiello in the Administration of Title VII

1. In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court held that a similar exclusion of coverage for pregnancy benefits under a public disability income plan administered by the State of California did not amount to individious sex discrimination in violation of the equal protection clause of the Fourteenth Amendment to the Constitution. In finding the "under-inclusiveness of the set of risks that the State has selected to insure"[5] to be nondiscriminatory, this Court observed that the plan neither "discriminated[d] with respect to the persons or groups which are eligible for disability insurance protection under

4. The Court of Appeals also affirmed the finding that the Company violated Title VII by requiring pregnant employees to return to work within six months of the commencement of leave, or three months from delivery. The Petitioner does not present that question for review by this Court.

5. 417 U.S. at 494.

the program,"[6] nor "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived . . ."[7]. As the Court succinctly summarized, the predicate for a finding of discriminatory treatment was plainly lacking: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[8]

Notwithstanding the presence of the identical factors in the subject case which this Court utilized in *Aiello* to explain the nondiscriminatory nature of the pregnancy exclusion therein, the Court of Appeals summarily dismissed *Aiello's* applicability, finding it "not dispositive," because that case arose in a constitutional, rather than statutory, context (App. p. A8). It is submitted, however, that *Aiello is* dispositive and that the source of the Court of Appeals error lie in its misconception of this Court's analysis in *Aiello*.

The equal protection context involved in *Aiello* posed a two step analytical framework: *First*, was there discrimination on the basis of sex? *Second*, if so, was it defensable on the grounds that rationale reasons supported it. While the second step of analysis may conceivably yield different results in the statutory context due to Title VII arising under the commerce, rather than equal protection clause, the first question is the *same* in either the constitutional or statutory context. Since this Court decided in *Aiello* that the pregnancy exclusion was not discriminatory, that holding, forming the initial, as well as dispositive step of analysis, disposed of this case. The distinctions drawn by the Court of Appeals on the basis of the rational State interests pertinent to the second step of analysis are wholly irrelevant and, accordingly, an erroneous basis for distinguishing *Aiello*.

6. *Id.*

7. *Id.* at 496.

8. *Id.* at 496-97 (footnote omitted).

The subject decision of the Court of Appeals therefore conflicts with this Court's decision in *Aiello* and mandates review by this Court to provide guidance to the federal judiciary concerning the relationship of that case to the administration of Title VII.

2. The Court of Appeals justified its decision primarily upon deference to the E.E.O.C.'s self-serving sex discrimination guidelines which require insurance coverage for pregnancy when coverage for most other disabilities is provided (App. p. A12). The guideline is, however, untenable, and the power wielded by the Commission thereunder constitutes a particularly pernicious abuse of agency power which commands review by this Court.

a. The dissenting Justices in *Aiello* relied heavily upon the Commission's sex discrimination guidelines (pp. 2-3, *supra;* 417 U.S. at 501). In express response to the dissent, the majority rejected that argument, explaining (*Id.* at 496 n. 20):

> * * * Normal pregnancy is an objectively identifiable physical condition with unique characteristics. * * *
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

The rationale of *Aiello's* footnote no. 20 is equally applicable to this case and compels rejection of the Commission's fundamentally inconsistent sex discrimination guidelines.

b. It is axiomatic that agency guidelines which are founded upon supportive legislative history are entitled to great deference[9] by the judiciary, and conversely, those which are con-

9. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971).

trary to the legislative history are entitled to no deference.[10] Here, however, there is *no* legislative history[11] supporting the Commission's guideline.[12]

Indeed, the Commission, for the first eight years in the administration of the Act uniformly maintained that the practice it now condemns was *not* unlawful. Thus, the Commission maintained:

> [I]t is our opinion that . . . a company's group insurance program which . . . excludes from its long term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.[13]

10. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

11. The "sex" discrimination amendment to Section 703(a) was passed only one day before the House approved Title VII. There was, as a result, only cursory floor debate; indeed, even the Court of Appeals observed that it was inserted in a "tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat." (App. p. A9) Commentators have reached the same conclusion as well. See, e.g., Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So. Cal. L. Rev. 965, 968 (1973); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

12. The absence of any meaningful legislative history concerning the scope of the congressional ban against sex discrimination has, moreover, engendered a significant conflict in the Court of Appeals over the breadth of this proscription. Thus, the Court of Appeals concluded herein, notwithstanding its concession that pertinent legislative history was "indeed meager," that "the broad purposes of the Act can be applied to sex discrimination cases. Congress intended to strike at all discriminatory treatment of men and women." (App. p. A9) In contrast, however, the Fifth Circuit held in *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1085, 1090 (*en banc*, 1975), that the inconclusive legislative history compelled the "negative inference" that "[C]ongress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications." This conflict, it is submitted, threatens uniform administration of Title VII and hence, further mandates review by this Court.

13. This position statement of the Commission's General Counsel was nationally reported in CCH Employment Practices, December 21, 1966, 17,304.43 (1966 ed.).

Notwithstanding the absence of any articulated basis for change, the Commission then suddenly reversed itself, and after the charges in this case were filed, promulgated the rule that "benefits shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities" (p. 3, *supra*). By giving great deference to the Agency's new guideline, the Court has ignored and corrupted the premises upon which deference is owed.

First, deference accorded an agency's interpretation is sound only to the extent that it "has been acted upon for a number of years" and is consistent with legislative history. *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965). Neither requirement is met in this case. In such circumstances, the original view is traditionally deemed the correct one,[14] especially since there was no foundation for change from the longstanding prior position which, moreover, Congress made no attempt to modify when Title VII was amended in 1972.[15]

Second, the Commission's guidelines are not reasonable in fact; they equate pregnancy with illness for purposes of requiring coverage for it on a same par with other temporary disabilities occasioned by illness. Indeed, as one federal court recently critically observed in refusing to give any deference to the same guideline here involved, "there appears to be no factual basis upon which these regulations were drawn."[16] Further, there is simply no evidence that the Commission gave serious thought to the widespread ramifications[17] of its sudden reversal in policy.

14. Cf. *N.L.R.B.* v. *Savair Mfg. Co.*, 470 F.2d 305 (6th Cir. 1972), *aff'd*, 414 U.S. 270 (1973).

15. Cf. *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973).

16. *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238, 245 (N.D. Ga. 1973).

17. American Telephone and Telegraph Company, *amicus curiae* in the Court of Appeals, estimates, for example, that based on an eight week leave, system wide benefit costs for the projected number of pregnancies would have increased its costs by $19,037,330 for 1971-1972.

Third, and perhaps the most pernicious aspect involved, the agency has worked a reversal of the burden of proof upon litigants: Under the shield of "agency deference", the Commission has evaded the scrutiny required of its reversed position, and the Court of Appeals' (App. p. A12) acquiesence has catapulted the guideline, from the shallow sands upon which it is built, into a fortress-like rule of law which exists simply because the Commission says it does. By baselessly changing its position and then bootstrapping its position on the ground that its views are entitled to great deference, the Agency has insulated itself from challenge and avoided its burden of proof. Such abusive exploitation of the rule of deference to agency guidelines, it is submitted, has engendered lack of respect in the business community for the Commission's view and, accordingly, warrants review by this Court to end the increasing litigation generated by the widespread refusal to acquiese in the Commission's newly divined rule.

3. The uncertain status concerning the effect to be given *Aiello* in the Title VII context has already produced a significant conflict in the federal courts, which is only serving to engender further litigation as employers and fair employment practice agencies square-off awaiting further guidance from this Court. Thus, in direct conflict with the subject decision the district court for the Southern District of New York found *Aiello* dispositive in a Title VII case similar to the subject one: In *Communications Workers of America* v. *A. T. & T. Co., Long Lines Dept.*, 379 F. Supp. 679, 682 (S.D.N.Y.), the Court, relying exclusively upon *Aiello,* and dismissing the case, stated:

> The holding [in *Aiello*] was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a

> holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII. . . .

That judgment has been appealed to the Court of Appeals for the Second Circuit,[18] where it has been argued and is awaiting decision. In contrast, the district court in *Sale* v. *Waverly-Shell Rock Board of Education,* ..... F. Supp. ....., 9 FEP Cases 138, 141 (N.D. Iowa 1975), refusing to apply *Aiello* and finding a violation, certified the case for immediate appeal pursuant to 28 U.S.C. § 1292(b), because of its assessment that "this order involves a controlling question of law as to which there is a substantial ground for difference of opinion." Additionally, an appeal involving the effect of *Aiello* in the Title VII context is pending in the Court of Appeals for the Fourth Circuit.[19] Because of the volume of litigation generated as a result of the *Aiello* decision, and the likelihood of additional cases crowding the judicial and agency dockets,[20] this Court should clarify the meaning of that case and its relationship to Title VII.

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18. No. 74-2191, Court of Appeals for the Second Circuit.

[While this Petition was in the final stages of printing, counsel was telephonically advised that the Court of Appeals had just reversed and remanded the *A.T.&T.* case. While this reversal further demonstrates the conflict within the judiciary concerning the effect of *Aiello,* our analysis of the Second Circuit's decision must, of necessity, be reserved to our reply to the anticipated opposition to this Petition.]

19. *Gilbert* v. *General Electric Company,* Fourth Circuit, No. 74-1557, on appeal from the U.S. District Court for the Eastern District of Virginia, 375 F. Supp. 697 (1974).

20. E.g., *Isakson* v. *Fireman's Fund American Insurance Co.,* No. 74-67, (City of Minneapolis Dept. of Civil Rights), *Ohio Civil Rights Commission* v. *Nationwide Life Insurance Co.,* Case No. SE-6-74-2353 (O.C.R.C.); *Harding* v. *Kemper Insurance Co.,* No. 74-E-448-S (Massachusetts Comm. Against Discrimination).

CONCLUSION

For the foregoing reasons, Liberty Mutual Insurance Company respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendices

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 74-1233

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,

Equal Opportunity Commission as Amicus Curiae,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Appellant.

(D. C. Civil Action No. 72-169)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: STALEY, HASTIE and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 20, 1974, be, and the same is hereby affirmed. Costs taxed against appellant.

Attest:

/s/ T. F. QUINN,
Clerk

February 11, 1975

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 74-1233

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Appellant.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

Argued October 30, 1974

Before STALEY, HASTIE and ALDISERT, *Circuit Judges.*

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OPINION OF THE COURT.

(Filed February 11, 1975)

By STALEY, *Circuit Judge*.

This appeal presents this court with significant questions of first impression. We are asked to determine whether Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, et seq.,[1] is violated by a private employer who maintains employment policies that exclude pregnancy benefits from the company's income protection plan and that require female employees to return to work within three months after childbirth or face termination.

Appellant, Liberty Mutual Insurance Company ("Liberty Mutual") is a national insurance underwriting business. Two of its employees, Wetzel and Ross, filed charges of sex discrimination with the Pennsylvania Human Relations Commission ("PHRC"). Filing of these charges led the company to review and change certain employment policies. The PHRC, however, failed to conciliate the parties, and Wetzel and Ross then filed charges with the United States Equal Employment Opportunity Commission ("EEOC"). After the statutory period within which charging parties are precluded from commencing litigation, Wetzel and Ross requested and received right-to-sue letters. On February 28, 1972, appellees commenced a class action on behalf of female employees of Liberty Mutual, alleging that appellant's hiring and promotion policies and its pregnancy related policies violated Title VII. The court granted the plaintiffs' motion for class action and ordered that the suit could be maintained as a class action under Rule 23(b)(2) of the Fed.

1. Section 703(a)(1) of the Civil Rights of 1964, 42 U. S. C. § 2000e2(a)(1), in pertinent part provides:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discrimnate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *."

R. Civ. P. On March 26, 1973, after extensive discovery, Wetzel and Ross moved for partial summary judgment only as to the issue of liability. The district court, on January 9, 1974, finding no issues of material fact, entered an interlocutory order finding that Liberty Mutual's pregnancy-related policies violated Title VII of the Civil Rights Act of 1964. Liberty Mutual subsequently filed a motion for reconsideration which was denied by the court. On February 20, 1974, the district court, pursuant to Rule 54(b), directed the entry of final judgment as to the pregnancy-related issues,[2] thus giving this court jurisdiction under 28 U. S. C. § 1291. It is from this order that Liberty Mutual appeals. The district court, in its order of January 9, 1974, also ruled that Liberty Mutual's hiring and promotion policies violated Title VII. On March 19, 1974, that court made its judgment final, and the company appealed at No. 74-1515. That appeal has been disposed of by another panel of this court, and we need not discuss the issues presented there.[3]

Although appellant relegated the issue to a mere footnote, we believe the question of whether the district court had jurisdiction is worthy of discussion. One who alleges a violation of Title VII may not sue in federal district court until he has exhausted his administrative remedies.[4] The filing of a charge with the EEOC is a statutory prerequisite to commencing an action in federal court. Richardson v. Miller, 446 F. 2d 1247, 1248 (C. A. 3 1971).

Appellant contends that the portion of the complaint relating to the pregnancy policies should have been dismissed because those claims were not presented to the EEOC. The basis for this contention is that a box labeled "Benefits" on the Notice of Charge form was not checked. Instead, a box labeled "Terms and Conditions" was checked. We find no merit in appellant's

2. The district court's opinion is reported at 372 F. Supp. 1146 (W. D. Pa. 1974).

3. Wetzel et al. v. Liberty Mutual Ins. Co., No. 74-1515 (C. A. 3, 1975).

4. 42 U. S. C. § 2000e-5(e).

contention. The private litigant plays an important role in the enforcement of Title VII. The EEOC was created by Congress to effectuate the goals of the Civil Rights Act of 1964 ("Act"). In 1972 the Equal Employment Opportunity Act, 42 USC § 2000e-5, provided the Commission with further authority to bring its own actions. However, the Act did not provide the Commission with direct powers of enforcement. Since enforcement lies exclusively in the federal courts, Choate v. Caterpillar Tractor Co., 402 F. 2d 357, 359 (C. A. 7 1968), the rights of a private party, therefore, must not be barred by procedural technicalities if Title VII is to operate effectively. Alexander v. Gardner-Denver Co., 415 U. S. 36, 44 (1974). Courts have continously construed Title VII so as not to allow procedural technicalities to bar a claim under the Act. Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (C. A. 5 1970). The only jurisdictional prerequisites that must be satisfied to commence federal action are a timely filing of charges with the EEOC and the receiving and acting on the EEOC notice of the right to sue. 42 U. S. C. § 2000e-5(e).

Under the Act the charge of discrimination must be initiated by laymen—people who are apt to be of varying educational backgrounds and certainly few, if any, having knowledge of the subtleties of pleading and of statutory distinctions. Further, the complainants are probably, at this point, not represented by counsel and should not be held to as strict a standard as appellants have suggested. Since Wetzel and Ross have satisfied the jurisdictional prerequisites and are people without legal expertise, we believe that to deny them access to the federal courts because of a technical error would seriously undermine the policies of the Act and serve only to harm the interests of those whom the Act was designed to protect. "[T]echnicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman Co., 404 U. S. 522, 527 (1972).

Also persuasive is the Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U. S. 792, 798 (1973). The Court held that since court actions under Title VII are *de novo* a complainant is not restricted to "those charges as to which the Commission has made findings of reasonable cause." See also Fekete v. U. S. Steel Corp., 424 F. 2d 331 (C. A. 3, 1970); Robinson v. Lorillard Corp., 444 F. 2d 791 (C. A. 4, 1971).

We, therefore, believe that the district court properly had jurisdiction.

Pregnancy Benefits.

Liberty Mutual provides its employees with an income protection plan. The plan is a fringe benefit and provides employees with the payment of income during periods of disability. Funding of the plan is partially through employee contributions. After an employee is out of work eight days because of an illness requiring the care of a doctor, the employee receives a percentage of his salary for the duration of his leave. If the employee has been with the company five years or more, he receives benefits up to age 65. If the employee has been with the company less than five years, he receives the benefits for 103 weeks. Liberty Mutual, however, does not pay any benefits under the income protection plan for disability due to pregnancy or for any disability related to pregnancy. Leaves or temporary absences due to pregnancy-related disabilities are not covered by the plan.

Liberty Mutual maintains that Title VII does not require it to include pregnancy benefits in the income protection plan. In its reply brief and at oral argument, Liberty Mutual primarily relied on Geduldig v. Aiello, 417 U. S. 484 (1974). Appellant feels that Aiello is dispositive of the case before us. We believe there are several distinctions between the cases and therefore disagree with the appellant.

Geduldig v. Aiello involved the question of whether there was sex discrimination in violation of the Equal Protection Clause

of the Fourteenth Amendment. Here we are involved with the question of whether there was discrimination in violation of Title VII of the Civil Rights Act of 1964. In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced.

In Geduldig v. Aiello, the Supreme Court held that the State of California could choose not to include disabilities relating to normal pregnancy within its disability insurance program and not be violative of the Fourteenth Amendment's prohibition against sex discrimination. The Court relied heavily on the fact that California's program was totally self-supporting, "never drawing on general state revenues." Geduldig v. Aiello, supra at 492. We are not faced with an insurance program similar to Aiello's, and we need not attempt to balance public social welfare interests with the Constitution. An examination of California's program showed that only *normal* pregnancy and delivery disabilities were excluded from the benefits, while Liberty Mutual excluded *all* pregnancy-related disabilities. It is worthy of note that at oral argument, appellants counsel declared that the company's income protection plan would not cover a disability suffered by a pregnant women but would have covered the disability had the woman not been pregnant. The California program as of January 1, 1974, covers certain pregnancy-related disabilities. See Geduldig v. Aiello, 417 U. S. 484, 490-91, note 15.

For the above reasons we do not rely on Geduldig v. Aiello and find that it is not dispositive of the issues presently before us.

We then will proceed with our analysis, first examining the legislative history of the statute involved. The Civil Rights Act of 1964 was enacted to assure equality of employment opportunities. McDonnell Douglas Corp. v. Green, 411 U. S. 792; Griggs v. Duke Power, 401 U. S. 424 (1971). Reading the statute and the legislative history of the Act indicates that

one of the goals of Congress was to provide the opportunity for anyone to enter the job market without being subjected to disparate treatment because of race, color, religion, sex, or national origin. "The purpose of this title is to eliminate, through utilization of formal and informal remedial procedures, discrimination in employment." H. Rep. No. 914, 1964, U. S. Code Cong. & Adm. News 1964, p. 2401. Congress intended to eliminate any artificial or arbitrary impediments to employment. Until the 1964 Civil Rights Act, women had little or no legal weapons to attack their systematic exclusion from many employment opportunities. The legislative history pertaining to the addition of the word "sex" to the Act is indeed meager. It appears that the amendment to the Act was offered in a tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat. See 110 Cong. Rec. 2804-05 (1964).

In 1972 Congress had the chance to make any changes to the Act that it felt was necessary. No substantive changes were made regarding sex discrimination, and we feel this indicates a congressional satisfaction with the operation and administration of the Act. We, therefore, believe that the broad purposes of the Act can be applied to sex discrimination cases. Congress intended to strike at all discriminatory treatment of men and women. Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (C. A. 7 1971), cert. denied, 404 U. S. 991 (1971).

To effectuate the goals of Title VII, Congress created the EEOC. 42 U. S. C. § 2000e-4. As an agency, the EEOC was given the power by Congress to issue regulations or guidelines that would indicate what are or are not proscribed discriminatory practices. These guidelines are the agency's interpretation of the statute. When faced with statutory construction problems, courts have generally held that the guidelines are entitled to great deference. McDonnell Douglas Corp. v. Green, supra; Griggs v. Duke Power Co., supra.

The guidelines[5] we deal with here prohibit an employer from discriminating between men and women with regard to employment policies and fringe benefits.

Appellate urges us to reject these guidelines on the basis that the guidelines were contra to the EEOC's earlier position and are now wholly inconsistent with the policy and understanding of

5. "§ 1604.9 Fringe benefits.

"(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * *

"(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

* * *

"1604.10 Employment policies relating to pregnancy and childbirth

* * *

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, and availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

the statute and therefore should be given no deference by this court. Appellant cites us Espinoza v. Farah Mfg. Co., 414 U. S. 86 (1973) in support of the argument. In that case the petitioner alleged that Farah had discriminated against her because of her "national origin" in violation of Title VII. The Supreme Court in Espinoza said the EEOC guideline then in question,

> "[T]he guideline relied on . . . is no doubt entitled to great deference, [citing cases] but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." Espinoza supra at 94.

The Court was persuaded not to follow the EEOC interpretation of "national origin" because of legislative action by Congress. The "obvious congressional intent" was found in other statutes that required federal employees to be citizens of the United States. The Court concluded that Congress did not intend that citizenship be a requirement for federal employment and "at the same time, prevent private employers from doing likewise." Espinoza supra at 91. The EEOC guideline was, therefore, rejected. Appellant suggests that because the EEOC had for several years indicated that the denial of pregnancy benefits did not violate the Act and now holds that this practice does violate the Act, the EEOC is inconsistent, making the guidelines not worthy of our consideration. The inconsistency to which the Supreme Court addressed itself in Espinoza was that the EEOC guideline was not reflective of the congressional intent. The Court did say it was significant that the EEOC had held two different views, but went on to say that the more recent guideline was entitled to great deference. Espinoza supra at 94. Unlike Espinoza, we have not found any congressional intent contrary to the EEOC guideline nor any "compelling indications" that it is wrong. Appellant has not shown any evidence in light of the legislative history that would indicate that the guidelines are inconsistent with any congressional intent. A study of the legis-

lative history of the Act does not show any intent other than to strike at the broad spectrum of discrimination.

We are not persuaded by appellant's argument that because the guidelines in question were issued in 1972, they should not be given our deference. The EEOC as the agency charged with the responsibility of administering the Act, has issued the guidelines to keep pace with changes in society's attitudes. This evolutionary process is a necessary function of our legal system—a system that must remain flexible and adaptable to ever-changing concepts of our society. Congress has recognized this intrinsic process. See S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 5, comments by Sen. Williams.

We feel that the legislative purpose of the Act is furthered by the EEOC guidelines and that the guidelines are consistent with the plain meaning of the statute. Mindful that the guidelines are interpretive rules, we will give them our deference as required by Griggs v. Duke Power Co., supra.

Under the pertinent guidelines, it is discriminatory to treat pregnancy differently from other temporary disabilities. 29 C. F. R. § 1604.10(b). Liberty Mutual expressly excludes all pregnancy disabilities from coverage under its plan while at the same time covers all other disabilities except those voluntarily inflicted.

Appellant, in justification of this policy, argues that because pregnancy is voluntary and illnesses are not, pregnancy can be excluded from its income protection plan. We disagree. Voluntariness is no basis to justify disparate treatment of pregnancy. There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm.

According to the Liberty Mutual's policy, all disabilities that could result from the above activities are covered under the

income protection plan. Even if we were to accept appellant's argument of voluntariness, we find that some voluntary disabilities are covered while one voluntary disability that is pecular to women is not so covered. Either way we find no support for appellant's argument. Moreover, pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception, short of surgery, and for health reasons many women cannot use the pill. This court will not accept "voluntariness" as a reasonable basis for excluding pregnancy from appellant's income protection plan.

Appellant next contends that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded from coverage. Again we disagree. We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.[6]

Thus, pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness.

Under Liberty Mutual's plan nearly all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand.

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6. See the proposal by Citizens' Advisory Council on the Status of Women, Love's Labors Lost: New Conceptions of Maternity Leaves. 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260, 282 (1972).

Appellant also contends that the plan does not violate Title VII because of the company's legitimate interest in maintaining the financial integrity of the plan.

Appellant has offered no statistical information from which we could conclude that the increased cost for pregnancy benefits would be "devastating." we do realize that there would be an increased premium. However, we are not convinced that integrity of the plan would be jeopardized.

Giving our deference to the EEOC guidelines, we agree that cost is no defense under Title VII to this particular issue. 29 C. F. R. § 1604.9(e).

Appellant advanced several other arguments to support its contentions, but we find them wholly without merit. The company's policy is neutral on its face but treats a protected class of persons in a disparate manner. This is precisely what Title VII intends to strike down. Griggs v. Duke Power Co., 401 U. S. 424.

We conclude that Liberty Mutual's income protection plan violates Title VII of the 1964 Civil Rights Act by excluding pregnancy benefits from coverage while including other kinds of temporary disabilities.

Maternity Leave.

Prior to September 1970, appellant's female employees who became pregnant were terminated after the eighth month with no right to re-employment. This policy was modified in September 1970 and again in November 1971 to allow a pregnant woman "to work for as long as her physician certifies her ability to work." This is presently the company's policy. It further allows a woman who has been employed by the company for one year to take a maternity leave of absence of six months from when the leave commences, or three months from the date of delivery, whichever comes first. The employee must return to work by or within the time limit or lose her job. This

time limitation is applied only to maternity leaves and not to any other leave of absence for other temporary disabilities. In essence, this means a person who suffered from a temporary disability other than pregnancy would return to work after recovery; however, a woman with pregnancy related disabilities must return to work within the specified time limit or be fired.

As we did in our ananlysis of pregnancy benefits and for the same reasons, we allow great deference to the EEOC guidelines. Also in keeping with our prior analysis we will view the company's leave policies, keeping in mind that pregnancy is to be treated as any other temporary disability.

The EEOC guidelines concerning the leave issue are in pertinent part as follows:

> "* * * * [E]mployment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits * * * shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C. F. R. § 1604.10(b).
>
> "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." 29 C. F. R. § 1604.10(c).

The guidelines also provide that it is a violation of title VII for an employer to discriminate between men and women with regard to "fringe benefits," of which leaves are one. 29 C. F. R. § 1604.9(a) & (b). It would appear, under the EEOC's interpretation, that Liberty Mutual's maternity leave policy violates Title VII. Pregnancy, as a temporary disability, must be treated no differently than any other disability. We are not requiring appellant to give to women any more than it already gives to men. Since appellant provides leaves for all temporary disabili-

ties, it must also provide leaves for pregnancy on the same basis.

In cases that have dealt with Title VII, courts have held that any policy that operates to totally exclude women is violative of the Act. Willingham v. Macon Telegraph Pub. Co., 482, F. 2d 535 (C. A. 5 1973); Sprogis v. United Air Lines, Inc., 444 F. 2d 1194; Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (C. A. 5 1969). In essence Liberty Mutual has two leave policies—one for pregnancy and one for other temporary disabilities. Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination. Liberty Mutual argues that since most women are recovered within six weeks and that most women do not return to work after childbirth, the company is justified in maintaining the present maternity leave policy. We disagree. This attitude is precisely what Congress intended to strike down. Discrimination based on stereotypes or overly categorized distinctions between men and women forbidden by Title VII. Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (C. A. 7 1969); Weeks v. Southern Bell Tel. & Tel. Co., supra. Justice Marshall, concurring in Phillips V. Martin Marietta Corp., 400 U. S. 542, 545 (1971), recognized that Congress intended to prevent employers from relying on stereotyped characterizations in the formulation of their employment policies. The legal standard articulated by the EEOC requires that women be considered on an individual basis on their own particular capabilities and not on "characteristics generally attributed to the group." 29 C. F. R. § 1604.2(a)(1)(ii). A policy, therefore, that is founded on generalizations, such as most women after giving birth are fully recovered within six weeks, or that most women do not return to work after giving birth, is discriminatory because it makes no provision for considering individual capabilities. Appellant's maternity leave policy, requiring all women to return to work within three months or be fired, penalizes

women because of a physiological condition found only in their sex. There is no leeway under this leave policy to ascertain individual capabilities or characteristics. As the district court properly found, Liberty Mutual's policy bears "no relation to the fitness of any individual female to perform the functions of her job." 372 F. Supp. at 1161. One women may be physically and mentally prepared to return to her job within the arbitrary time limit, while another, although wishing to return, may be unable to do so because she has not fully recovered. We believe that a leave policy that in essence operates as two distinct policies, one affecting only women, cannot stand under Title VII. A maternity leave policy that is applied to one sex only, that is based on class generalizations of that sex, and that treats pregnancy different from other temporary disabilities, is not permitted under Title VII. The district court, therefore, properly concluded, as a matter of law, that Liberty Mutual's maternity leave policy is violative of § 703 of Title VII.

Appellant, Liberty Mutual, did not assert at trial or on its motion for reconsideration any affirmative defense, nor did it allege any evidentiary facts that could arguably give rise to a defense.[7] And even now, appellant's briefs merely allude to the possibility of a defense, never presenting to this court any substantive arguments that have been developed from the cases that have discussed this issue. There are a number of cases that consider the business-necessity defense, but Liberty Mutual has not cited any of them in relation to its justification argument. The district court, however, did address itself to the possibility of a bona fide occupational qualification, 372 F. Supp. at 1161. The court, relying on Weeks v. Southern Bell Tel. & Tel. Co., supra, and Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 (C. A. 9 1971), concluded that Liberty Mutual did not meet its burden of proof because it did not present any evidence that could raise that defense.

7. On Liberty Mutual's motion for reconsideration, the district court noted that the company did not set for any evidence in support of its argument. 372 F. Supp. at 1164.

It is only now, on appeal, that appellant attempts to justify its discriminatory policies. It is clear that an issue not raised at the trial and then presented for the first time on the appeal will not be considered by this court. A party who fails to plead or fails to produce evidence that raises certain issues is "precluded from raising such issues on appeal." Cady v. Twin Rivers Towing Co., 486 F. 2d 1335, 1337 (C. A. 3 1973); Bogacki v. American Machine & Foundry Co., 417 F. 2d 400, 407 (C. A. 3, 1969); Crompton-Richmond Co.-Factors v. Smith, 392 F. 2d 577 (C. A. 3 1967).

We conclude that Liberty Mutual's income protection plan and maternity leave policy are violative of Title VII of the 1964 Civil Rights Act. The district court properly granted summary judgment.

For the foregoing reasons, the judgment of the district court will be affirmed.

UNITED STATES DISTRICT COURT

W. D. Pennsylvania

SANDRA WETZEL and MARI ROSS on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Defendant.

Civ. A. No. 72-169

Jan. 9, 1974

OPINION

WEBER, *District Judge*

The two named Plaintiffs on behalf of themselves and all other female technical employees employed in Defendant Liberty Mutual Insurance Company's Claims Department (the Company) have filed a Complaint charging that the Company discriminated against women in hiring, job classification, promotions, and in the compensation and job benefits they received for the jobs they were allowed to hold.

The Representative Plaintiffs are Sandra Wetzel, a woman, who was hired by Defendant Company as a "Claims Representative" in July 1967, and Mari Ross, who was hired by Defendant Company as a "Claims Representative" in September 1967. Both allege that they suffered discrimination by reason of their

sex because of the hiring, job classification, pay differential, and employment benefit policies of Defendant Company and that these policies were applied to all female technical employees in the Defendant's Claims Department throughout the nation where Defendant Company did business.

The court determined that the action should proceed as a class action covering all female technical employees in the Defendant's Claims Department in the entire geographical area where the Company did business. The class as now defined includes all such employees who were hired or working for the Company in its Claims Department since July 2, 1965, the effective date of Title VII of 42 U. S. C. § 2000e et seq., the Equal Employment Opportunity Act of 1972.

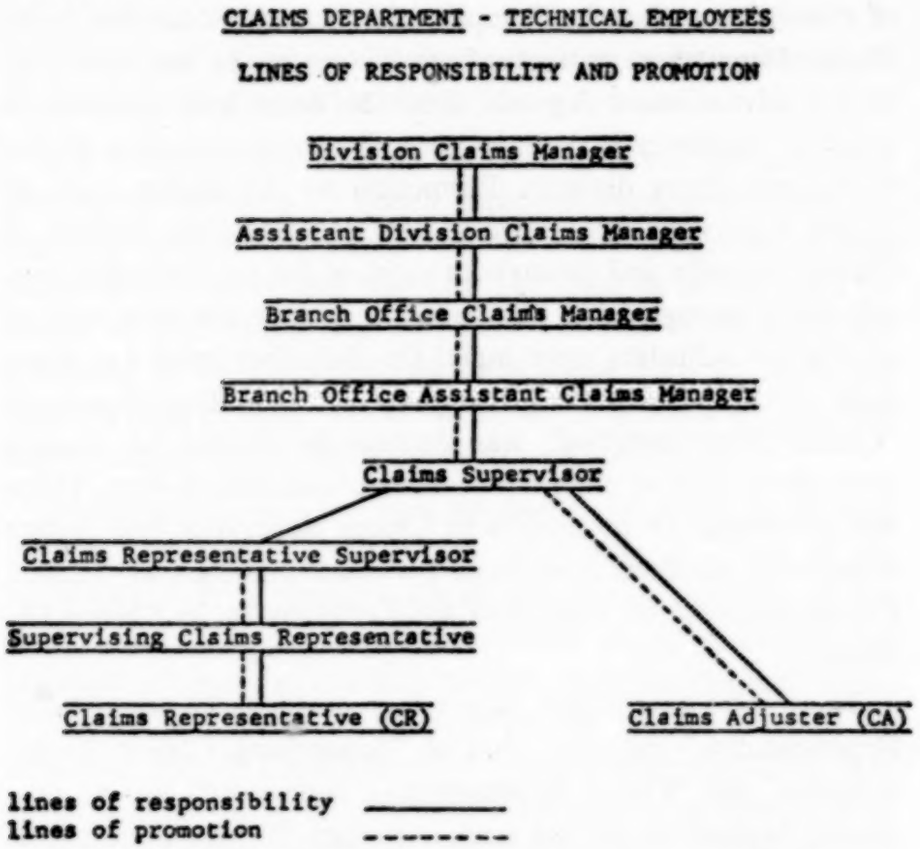
Extensive discovery has been employed and the Plaintiffs now file a motion for partial summary judgment on certain of the issues raised. It is agreed between the parties that one of the issues, designated the "equal pay" issue, is not susceptible of summary judgment at this time because there are disputed issues of fact with respect to whether or not the work performed by women in the job classification of "Claims Representative" was equal to the work performed by men in the job classification of "Claims Adjuster" for which they were paid a substantially higher salary. However, the Plaintiffs at this time allege that there is no genuine issue as to any material fact with respect to the job classification under which men and women were originally hired as technical employees in the Claims Department, with regard to the promotional policy within the Claims Department, and with regard to the pregnancy and maternity leave policies of the Company including the disability income protection plan of the Company as applied to women on maternity leave.

The key point of discrimination set forth in the pleadings, evidentiary material and briefs of the plaintiffs, and the *amicus curiae* brief of the United States Equal Employment Opportunity

Commission is the hiring policy of the Company, since original assignment in effect determines the employee's future chances of promotion within the Company. Because the Company in its Claims Department promotes from its own ranks, the opportunity for advancement depends upon the entry level position to which an employee is assigned upon first being employed by the Company's claim division. Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster and throughout most of the period under consideration through 1970 was limited to male employees because all Claims Adjusters were male. On the other hand the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women throughout most of the period under consideration here. There was no avenue of promotion to Claims Supervisor and higher supervisory positions from those personnel classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor", but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there is no similar line of promotion because all "Claims Supervisors" are drawn from the ranks of "Claims Adjuster".

The lines of responsibility and promotion are illustrated as follows:



The same educational requirements were in 1965 and thereafter until 1970 with respect to the hiring of "Claims Adjusters" and "Claims Representatives", a college degree. No prior experience in the insurance business was required and in fact the Company did not hire persons who had worked for other insurance companies in its entry level positions in the Claims Department.

Although the Defendant Company had employed "Claims Adjusters" for a long period of time the position of "Claims Representative" was created in mid-1965. The position was created when the Company had decided to handle more of its claims work from inside its offices. A recruiting brochure for this position was prepared and circulated through college

placement offices and employment agencies. The qualification for the "Claims Representative" position included a college degree. The recruiting brochure is entirely female oriented. Its title page bears the caption and picture identifying the position as a job fit for a queen. It shows women in its illustrations of persons performing their duties in this capacity. Between July 1, 1965 and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

The recruiting brochure used by the Company during this period describing the position and duties of "Claims Adjusters" was entirely male oriented, its illustrations showing men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and reciting the avenues of advancement from Claims Adjuster through Branch Office Claims Manager, Division Claims Manager, Manager Home Office Examiners' Division, and so on up the ladder. The Company promoted to advanced positions in its Claims Department solely from those persons who had served it in the capacity of "Claims Adjuster".

The two Representative Plaintiffs were hired in the position of "Claims Representative" and they have deposed that in answer to their inquiries they were informed that the position of "Claims Adjuster", the beginning of the promotional ladder in the Claims Department, was not available for women. It has been admitted by representatives of the Defendant that the two named Representative Plaintiffs were qualified for the position of "Claims Adjuster" at the time of the original hiring.

It would serve little purpose to recite in detail the great mass of statistical evidence which the Plaintiffs have produced in support of their contention that the two initial entry positions were segregated between male and female applicants, that the educational requirement for both positions was the same, that no prior insurance experience was required for either position, that the functions performed in these positions were very similar that the pay differential between the positions was substantial, being approximately $2,500 per year greater for the Claims Adjuster, that prior to 1971 no opportunity was given to women "Claims Representatives" to qualify for the position of "Claims Adjuster", and that all promotions to higher positions in the Claims Department were made from the ranks of the exclusively male "Claims Adjuster" classification.

In addition to the statistical evidence which is unrebutted here the Plaintiffs have produced additional supporting evidence of the Company's employment policies with respect to women in the Claims Division. Much of this evidence is in the form of oral testimony and affidavits which may be subject to a question of credibility but a good deal of the supporting evidence is documentary and supports the Plaintiffs' contention of a recognized pattern of treating the male and female employees in the Claims Department differently in respect to recruitment, hiring classifications, promotional opportunities, and salary.

We are not speaking of salary or compensation with respect to the question of whether equal pay was given for the same work but in connection with the entry level salary paid for the two classifications and the salary differential between "Claims Representatives" of considerable experience and the starting salary which they could receive when openings were finally made available to "Claims Representatives" to become "Claims Adjusters".

Two sections of Fed. R. Civ. P. 56 are applicable to our consideration of Plaintiffs' motion for summary judgment. Fed. R. Civ. P. 56(c) provides in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and [the] admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

and Fed. R. Civ. P. 56(e) which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Plaintiffs have relied chiefly on statistical evidence in support of their contention of discriminatory employment policies and in many cases the courts have accepted such evidence in determination of whether Title VII has been violated. Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 [8th Cir. 1970]; Witherspoon v. Mercury Freight Lines, Inc., 457 F. 2d 496 [5th Cir. 1972]; Bing v. Roadway Express, Inc., 444 F. 2d 687 [5th Cir. 1971]; Rowe v. General Motors Corp., 457 F. 2d 348 [5th Cir. 1972]. In accordance with these decisions and under the doctrine of McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 [1973], once the plaintiff has established a prima facie case by setting forth statistics of this kind the burden is on the employer to sufficiently explain the disparity in hiring; conclusory statements that the employer never discriminated in hiring is insufficient to satisfy this burden. As stated in *McDonnell*, supra, "The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the respondent's rejection." (p. 802, 93 S. Ct. p. 1824). We are of the opinion that the Defendant's response to the Plaintiffs' motion for summary judgment fails to address this burden at all, let alone rebut the Plaintiffs' evidence.

The response of the Defendant raises eight issues of defense, as follows:

1.

Neither of the named Representative Plaintiffs is currently in the employ of the Defendant. This is not a contested issue of fact. The Plaintiffs admit that both the representative party Plaintiffs have left the employ of Defendant and the question of whether or not their termination from employment was voluntary or forced by discriminatory employment practices of the Defendant is not an issue before us at this time. This is a matter of law concerning standing and it has been held that a former employee may bring an action to enforce rights under this statute claimed to have been infringed. In Hackett v. McGuire Bros., Inc., 445 F. 2d 442 [3d Cir. 1971] this contention was rejected;

> "The national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative." (pp. 446, 447).

The Circuit Court continued:

> "A person claiming to be aggrieved may never have been an employee of the defendant. Indeed the Act forbids discrimination not only by employers, 42 U. S. C. § 2000e-2(a)(2), but also by potential employers, 42 U. S. C. § 2000e-2(a)(1), by labor organizations, 42 U. S. C. § 2000e-2(c), and by employment agencies, 42 U. S. C. § 2000e-2(b). An aggrieved person obviously is any person aggrieved by any of the forbidden practices. (pp. 445-446).

An interesting commentary on the argument asserted to this court was made in Reed v. Arlington Hotel Co., Inc., 476 F. 2d 721 [8th Cir. 1973]:

> ". . . if this kind of an individual [a discharged employee, not seeking reinstatement] would be prevented from bringing class actions as the rules permit, there would be a windfall for the employer, and when any such matter was coming up, all they would have to do is discharge the employee . . ." (p. 723).

2.

The Defendant argues that the representative party Plaintiffs were offered "Claims Adjuster" status and has filed evidence to this effect. This is not denied by Plaintiffs but they contend that the terms of the offer were unacceptable and were made after the charges of discrimination were filed in this case with the United States Equal Employment Opportunity Commission in 1971. We find this to be a disputed issue of fact which may be relevant to the question of damages of the representative party Plaintiffs, but irrelevant to the question of violation of the statute which is before us. Under all circumstances, it is shown by the evidence that the offer of "Claims Adjuster" status was made long after the effective date of the statute in question, after both representative Plaintiffs had been employed in the positions of "Claims Representatives" for several years, and after the filing of the Complaints before the EEOC in this matter.

3.

Defendant claims that there is a dispute as to the content of conversations between representatives of the Company and a representative of the Pennsylvania Human Relations Commission. This alleged conversation bears on the Company's motive and intent in offering "Claims Adjuster" status to the named-Plaintiffs at the time that it did. We find this completely immaterial to the issue before us at this time because the offer of Claims Adjuster status was not made until the alleged discriminatory practices in violation of Title VII of the Act had continued for several years and the issue had been raised

by a Complaint to the Equal Employment Opportunity Commission by the named Plaintiffs.

4.

The Defendant contends that there is a disputed issue of fact on the question of whether or not the qualifications and entrance requirements for the position of "Claims Adjuster" are substantially different from those of "Claims Representative". Although with respect to the duties and responsibilities of each position which we have previously designated as the "equal pay" issue, not before the Court on this Summary Judgment motion, nevertheless we are concerned at this time with whether or not qualified female applicants were excluded from the position of "Claims Adjuster" and its subsequent promotional ladder. The statistical evidence shows that of more than 2,000 persons hired for the position of "Claims Adjuster" up through 1970, not one was female. The Defendant's own representatives have admitted that the representative Plaintiffs in this case were qualified for the position of "Claims Adjuster" at the time of original hiring. Therefore, we find that the Defendant has not met the burden of showing why no female personnel were hired for the "Claims Adjuster" position during the period following the effective date of Title VII until sometime after August 1971 and subsequent to the filing of complaints in the within matter. Plaintiff's contention is further supported by evidence that no female employees occupied the supervisory position of "Claims Supervisor" in the Company which were filled from the ranks of the "Claim Adjusters" until at least 1970. If the jobs were substantially dissimilar as the Defendant claims, the differential in starting salary may be justified but the total exclusion of women from entry into the higher paid "Claims Adjuster" position would remain as a discriminatory practice, and the promotional policy of the company in drawing all of its supervisory personnel from the ranks of the exclusively male "Claims Adjusters" continued

and emphasized the discriminatory effect of the policy. Therefore, we find that the Defendant's argument of a difference in the qualifications or duties of the two positions is immaterial to the Plaintiffs' charge that women were discriminated against in the selection of persons to fill the "Claim Adjuster" position. The company has offered no evidence of any bonafide occupational qualification to justify the complete exclusion of women for this position for over a period of five years, particularly in view of its later determination that some women "Claims Representatives" were qualified for and were offered these positions.

5.

The Defendant argues that it is not clearly established by the evidence that a large number of Defendant's female employees were desirous of and qualified for better positions. We cannot see the materiality of this argument to the question presently before us. The undisputed evidence establishes that after charges were filed in this case, the Defendant did interview its "Claims Representatives" and that 10% of them were offered and accepted positions as "Claims Adjusters". It was further established by testimony of a Company representative that the Company considered one-third of its women "Claims Representatives" to be qualified for the position of "Claims Adjuster". We fail to see how these facts alter the statistical evidence that of the more than 2,000 "Claims Adjusters" hired between 1965 and 1970 none were women, that all of the "Claims Representatives" hired during this period were women, that no woman in the job classification of "Claims Representative" was ever promoted to the supervisory position of "Claims Supervisor" during this period; that the Company deliberately engaged in the recruitment of women for the "Claims Representative" position and represented the "Claims Adjuster" position to be solely a position for male applicants.

6.

The Defendant objects to using the import of the recruiting brochures which were offered in evidence by Plaintiffs and has shown that they have since been superseded by new recruiting literature that is not sex oriented. However, in this matter as in several other matters offered in defense in this case the evidence shows that the Company policy changed after having been continued for a period of approximately five years from the effective date of Title VII and after the threat of the instant litigation became imminent. While the change in Company policy may affect the question of the amount of damages for which it may be liable, we cannot see what effect it has on the liability of Defendant for its policy from and after July 2, 1965.

7.

The Defendant disputes the Plaintiffs' statement that Defendant discouraged acceptances for the offer given to female "Claims Representatives" for re-classification to the position of "Claims Adjuster". We do not find this to be a dispute on a material issue of fact. Whether or not the company discouraged its female "Claims Representatives" from accepting the offered position of "Claims Adjuster", after that occupational classification was opened to women is immaterial to the issue of whether or not the Company practiced discrimination in its employment policies from and after July 2, 1965.

For the purposes of this motion we may assume that the Company did not discourage its female employees from accepting offers to transfer to the classification of "Claims Adjuster."

8.

The Defendant disputes the inferences which the Plaintiffs draw from the facts that no women were promoted to the positions of Branch Office Claims Manager and above. Whether

or not there is a dispute from these inferences the undisputed fact remains that no women in the Defendant's organization were promoted to or held these positions, and the Defendant has failed to come forward with any evidence to explain or refute the disparity in promotional practices.

II.

A second issue presented by Plaintiffs' motion for summary judgment may be broadly categorized as the maternity leave issue. This in turn is divided into two sub-issues which we label as

(a) the maternity leave conditions of employment and
(b) the income protection plan as applied to maternity leave.

(a) *Maternity leave policy.*

Until March 1967, the Company policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September 1970 the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position, available.

In September 1970, Company policy was changed to require pregnant employees either to terminate employment or to take a leave of absence at the end of the eighth month and to return to work either within six months of the date of termination of employment or three months from date of delivery, whichever comes first.

In November 1971, Company policy was again changed to permit an employee to work for as long as her physician certifies her ability to work prior to commencing a maternity leave of absence.

(a) *Income Protection Policy.*

The Company provides as a fringe benefit of employment an Income Protection Plan which provides for the payment of income during periods of disability. This plan is funded by insurance benefits. The only long term disability for which no benefits are provided is pregnancy. Furthermore, the Defendant's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child.

There is no disputed issue of fact as to the provisions of the maternity leave policies and the fringe benefit coverage of Defendant Company. The question presented to us is solely a matter of law as the application of Title VII to these undisputed facts.

A threshold question raised by Defendant is that the Plaintiffs have not fulfilled the statutory requirement of exhaustion of the administrative remedy, 42 U. S. C. § 2000e-5(e) because the charges filed by these Plaintiffs with the EEOC never mentioned this aspect of the complaint. The policy of the statute is to give the EEOC an opportunity to investigate and conciliate charges of discrimination.

The strongest case urged by Defendant Company is Tedford v. Airco Reduction Co., 4 F.E.P. Cases 406 [5th Cir. 1972], where the Court of Appeals reversed the dismissal by the District Court of a claim for discriminatory hiring practices because of mootness. The Appeals Court held that the subsequent hiring of plaintiff did not extinguish plaintiff's claim for back wages. However, the Court of Appeals did sustain the dismissal of claims of a discriminatory seniority system and discriminatory job assignments because,

> "the only factual allegation in Tedford's EEOC complaint was that Airco had refused to hire him as a truck driver because of his race."
>
> • • • • •
>
> "But giving this factual allegation the most generous construction possible, we still are unable to conclude that the investigation could properly have extended to Airco's seniority system, the driver lists, and the like. A charge filed before the EEOC is not a plenary charter for a Commission investigation of every aspect of a company's employment practices. The conclusion is unavoidable that the EEOC has never been called upon to investigate these practices, and accordingly that litigation of their validity in federal court is premature." 4 F.E.P. Cases, p. 409.

However, this was the same Circuit Court that decided Sanchez v. Standard Brands, 431 F. 2d 455 [5th Cir. 1970], and the *Tedford* court gave due regard to the *Sanchez* doctrine.

However, the courts have not restricted a plaintiff's suit under 42 U. S. C. § 2000e-5(e) to the specific issues raised before the EEOC, nor to the specific findings of the EEOC.

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U. S. C. §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. . . . and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings 'court actions under Title VII are de novo proceedings and . . . a Commission "no reasonable cause" finding does not bar a lawsuit in the case.' Robinson v. Lorillard Corp., 444 F. 2d 791, 800 [C.A. 4, 1971]; Beverly v. Lone Star Lead Construction Corp., 437 F. 2d 1136 [C.A. 5,

1971]; Flowers v. Local 6, Laborers International Union of North America, 431 F. 2d 205 [C.A. 7, 1971]; Fekete v. United States Steel Corp., 424 F. 2d 331 [C.A. 3, 1970]." McDonnell Douglas Corp. v. Green, 411 U. S. 792, 798-799, 93 S. Ct. 1817, 1822, 1823, 36 L. Ed. 2d 668 [1973].

In Sanchez v. Standard Brands, Inc., cit. supra, it was explained that in filing a charge with the EEOC an aggrieved person is supplied with a simple one-page charge form in which a row of boxes is provided to check the category of discrimination. We have as Exhibits in the present case the Notice of Charge which the EEOC gave to Defendant Company for each case which indicates "Basis of Discrimination—Sex", and "Nature of Charge—Promotion—Terms and Conditions." The *Sanchez* court found that no charging party should be barred from the assertion of a charge because of the technicality of his description.

> "Surely the only procedural requirement which should confront a Title VII complainant is the requirement that he state, within the ninety-day period, *facts* sufficient to trigger a Commission investigation. 431 F. 2d p. 462.

Sanchez continues:

> "At least one district court in this circuit has addressed itself to the question, however, and in our judgment it responded to the question by giving the correct answer. In King v. Georgia Power Co., N. D. Ga. 1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII 'may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.' 295 F. Supp. at 947. In other words, the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F. 2d p. 466.

It appeared from oral argument that Defendant, although it had received the "Notice of Charge of Employment Discrimination", had not seen copies of the original charges filed by Plaintiffs with the Commission before the argument. It appeared that they had never been requested. They were supplied to the court and counsel the day following the argument on this motion. The charge of Plaintiff Mari Ross states, inter alia, "During interview for position as claims representative was subjected to questions regarding marital situation and birth control." Furthermore, the Plaintiffs were required to pursue their charges through an appropriate state agency, the Pennsylvania Human Relations Commission, which on July 1, 1971, sent to Defendant a Complaint which recited, inter alia:

> "The complainants further allege that female applicants, as a condition of hire, are subjected to inquiries about anticipated marriage and family size, while men are not similarly evaluated as a condition of hire."
> (*Aune, Deposition, Exhibition 1*).

The court believes that the Representative Plaintiffs have properly employed the administrative procedures of Title VII which are a prerequisite to suit in the district court, they have properly raised the issue of sex discrimination in the "terms and conditions" of employment, that they specifically raised allegations of discrimination in respect to marital status and family planning sufficient to satisfy the administrative investigation requirement for raising the specific question of sex discrimination in maternity leave and pregnancy disability income policies in the present lawsuit.

As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "If you can think of something which is inextricably related to some

other thing and not think of the other thing, you have a legal mind."

We are dealing with a statute enacted by the Congress of the United States which says:

> "It shall be unlawful employment practices for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex; or
>
> (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." 42 U. S. C. § 2000e—2(a).

The defendant argues that its policies with regard to maternity leave and income protection for disability excluding pregnancy are not sex discriminatory because pregnancy is "sui generis" and thus subject to special treatment.

We believe that the court may take judicial notice of certain well known facts and statistics to illustrate the problem. We have taken our statistics from the United States Census figures as published in the 1974 edition of the World Almanac. In 1970, according to the census figures, there were 105,000,000 women and 100,000,000 men in the United States. In 1972 there were 31,000,000 women and 51,000,000 men, sixteen years of age and upwards, employed in the United States. Women between the ages of fourteen through forty-four amounted to 43.5% of the total female population or 45,675,000 women, which we equate with the childbearing age. There is a necessary overlapping of the 31,000,000 women in the work force sixteen years of age and older, and the 45,000,000 women in the childbearing ages of fourteen to forty-four. There were 3,191,000 live births in the United States in the year ending

June 30, 1973 which produces a birth rate of about fifteen per 1,000 of total population, but a fertility rate of sixty-nine births per 1,000 women fifteen to forty-four years of age. We recognize that more precise statistics are available but we are not concerned with minutiae and only recite these figures to illustrate the scope of the problem. Pregnancy is a natural condition, it is an expectable condition, it is a statistically foreseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law. If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statistically expectable number of employees. We have no doubt that a large insurance company is well aware of the precise statistics. We further note from this case that the defendant's recruiting policies for female technical employees in its claims department was aimed at young women finishing their college education, and that its promotional policy was to advance personnel within its own ranks and not draw upon outside sources. This policy would only increase the incidence of young women of childbearing age among the female employees of a growing business organization such as Defendant, which hired over 2,000 new female claims representatives in a five year period.

Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in Defendant's argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity. The distinction drawn between one hiring policy for men and another for women—each having pre-school age children—was rejected by the Supreme Court in Phillips v. Martin Marietta Corp., 400 U. S. 542, 544, 90 S. Ct. 496, 27 L. Ed. 2d 613 [1971] where there was no showing that the condition in question is a bona-

fide occupational qualification necessary to the operation of that particular business or enterprise.

The United States Equal Employment Opportunity Commission which is the administrative body created by Title VII to administer the Act, has issued the following Guidelines with respect to the question at issue:

> § 1604.10 Employment policies relating to pregnancy and childbirth.
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery, therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employee of one sex and is not justified by business necessity.
>
> 29 C. F. R. Labor, Chapter XIV, Part 1604, As Amended (As of March 31, 1972).
>
> § 1604.9 Fringe benefits.
>
> (a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

> (b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.
>
> 29 C. F. R. *idem.*

We give full recognition to the principle urged upon us that the EEOC Guidelines, 29 C. F. R. § 1604.10, effective April 5, 1972, do not have the force of law in the sense that the "regulations" or "substantive rules" of an administrative body authorized by statute to promulgate regulations to implement existing law have a binding effect. We also recognize that the Guidelines are interpretive statements of what the administrative officer thinks the regulations mean. Gibson Wine Co. Inc. v. Snyder, 90 U. S. App. D. C. 135, 194 F. 2d 329 [1951]. We are not compelled to follow them, but some deference is due. Espinoza v. Farah Manufacturing Co., 462 F. 2d 1331, 1335 [6th Cir. 1972].

Our own Court of Appeals states it more strongly:

> "Such an administrative interpretation is entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S. Ct. 849, 28 L. Ed. 2d 158 [1971]; Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 [1965]. That the guideline was not promulgated until after this suit was initiated is of no moment. Rights which came into being when the Act was passed are not abrogated by administrative interpretation. Bartmess v. Drewrys U. S. A., Inc., 444 F. 2d 1186 [C.A. 7], cert. denied, 404 U. S. 939, 92 S. Ct. 274, 30 L. Ed. 2d 252 [1971]."
>
> "A reading of the statute convinces us that the commission's interpretation furthers the legislative purpose of the Act and is consistent with the plain meaning of the language employed.
>
> 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' Sprogis v. United Air Lines, 444 F. 2d 1194, 1198 [C.A. 7], cert. denied, 404 U.S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 [1971]." Rosen v. Public Service Electric and Gas Co., 477 F. 2d 90 [3rd Cir. 1973], at pp. 94-95.

The only current provision of the Defendant's maternity leave policy under attack is the provision that the employee who is granted a leave of absence for maternity must return to work on a date certain or be terminated from employment. Plaintiffs' Complaint is zeroed in on the target that this limitation on leave of absence for temporary disability is only applied to maternity cases. There is no such requirement for any other disability.

Because state and local governments were exempted under Title VII until 1972, there are few Title VII cases involving pregnancy that give us guidelines, but the question has arisen frequently under cases presenting claims of denial of equal protection or denial of civil rights under color of state authority. We believe that Title VII standards are more compelling on a private employer in view of the express statutory mandate upon employers and the absence of the question of a "rational basis" for classification by which a state statute is measured. Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 [1970]. While a fixed state policy of classification may survive an equal protection attack it may still be violative of Title VII. See Schattman v. Texas Employment Commission, 459 F. 2d 32 [5th Cir. 1972], and Newmon v. Delta Airlines, Inc., 475 F. 2d 768 [5th Cir. 1973].

A district court in the Fifth Circuit has recognized that:

> "*Schattman*, . . . turned upon a divided Appellate Court's interpretation of the federal statute as it then read on the question of its exclusion from coverage of state employers and employees." Vick v. Texas Employment Commission, 6 EPD 5990 [S. D. Tex. Aug. 30, 1973].

However, the *Vick* case found this impediment to jurisdiction removed by the 1972 Amendment to Title VII, and proceeded to find that the state's denial of unemployment benefits on the grounds that the last trimester of pregnancy rendered a woman unavailable for work, violated the provisions of Title VII.

> "While the expectancy of life confined and incident to female pregnancy involves many delicacies of personal, institutional and societal interest, Roe v. Wade, 410 U. S. 113 [93 S. Ct. 705, 35 L. Ed. 2d 147] 41 L. W. 4231 (January 22, 1973), such a natural and necessary female condition cannot be a basis for categorical discrimination in light of Phillips and its plain interpretation of Title VII of the Act." *Vick*, cit supra, 5 EPD p. 5992.

Nevertheless, we can take some guidelines from the Equal Protection Clause cases dealing with pregnancy.

Judge Brown in his dissent in Phillips v. Martin Marietta Corp., 416 F. 2d 1257 [5th Cir. 1969], vacated *per curiam* 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 [1972] noted with respect to that case, where women with pre-school age children were denied employment, but not men:

> "The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody —and this includes Judges, Solomonic or life tenured— has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman". 416 F. 2d p. 1259.

To the argument that pregnancy is a voluntary status, the court in Buckley v. Coyle Public School System, 476 F. 2d 92 [10th Cir. 1973] says:

> "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground." 476 F. 2d at p. 95.

The Court of Appeals reversed the District Court's dismissal and remanded the case to the District Court for determination of a compelling state interest to justify the regulation.

In Green v. Waterford Board of Education, 473 F. 2d 629 [2nd Cir. 1973], the Court of Appeals reversed a District Court's dismissal of a complaint alleging that an inflexible maternity

leave policy denied equal protection. Even though the District Court had found a rational basis for the school board's action, the Court of Appeals found that the state's interests were not sufficiently promoted by rule to justify the arbitrary and inflexible regulation applied to pregnancy as distinguished from other disabilities.

> "The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." (p. 634).

See also the following Equal Protection clause cases involving maternity leave: LaFleur v. Cleveland Board of Education, 465 F. 2d 1184 [6th Cir. 1972], cert. granted 411 U. S. 947, 93 S. Ct. 1921, 36 L. Ed. 2d 408, but Cf. Cohen v. Chesterfield County School Board, 474 F. 2d 395 [4th Cir. 1973], cert. granted, 411 U. S. 947, 93 S. Ct. 1925, 36 L. Ed. 2d 408.

Defendant has interposed a defense of good faith reliance upon an administrative interpretation, particularly in its defense on the income protection exclusion policy here. This may be a matter to consider when the questions of affirmative relief or back pay are determined but we cannot see its application to the immediate question of the inflexible maternity leave standard. During the period prior to the Guidelines published in March 1972, there were no guidelines or opinions issued by the EEOC. 42 U. S. C. § 2000e-12(b) (Sec. 713(b) of the Act)

provides that "no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or commission complained of was in good faith, in conformity with and in reliance upon any written interpretation or opinion of the Commission."

We do not believe that the various opinion letters referred to in the brief of *amicus curiae* United States Chamber of Commerce, with respect to the inclusion of maternity benefits in an insurance plan meet the requirements of Sec. 713; there is no evidence that defendant relied upon them, they were not addressed to the defendant, and do not otherwise conform to the requirements of a written opinion under which the defense of reliance may be asserted. Local 189 United Papermakers and Paperworkers, etc. v. United States, 416 F. 2d 980 [5th Cir. 1969]; Sprogis v. United Air Lines, Inc., 444 F. 2d 1194 [7th Cir. 1971].

The maternity leave policy of the company which since 1970 has granted a leave of absence for six months from the last date of work before delivery, or for three months from date of delivery, whichever comes first, has no relation to the fitness of any individual female to perform the functions of her job.

The defendant has not alleged, nor has it offered any evidentiary material to establish that there is a disputed issue of fact dependent upon a bona fide occupational qualification. Such a bona fide occupational qualification is a defense to a charge of discrimination where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. This has been narrowly construed by the courts. In Weeks v. Southern Bell Telephone and Telegraph Company, 408 F. 2d 228 [5th Cir. 1969] the Court held this must give the employer "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." In Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 [9th

Cir. 1971] the court held the exclusion of women justified only when "the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of a wet-nurse." Under *Rosenfeld*, if one woman can do the job the employer cannot impose a blanket rule denying all women the opportunity.

Under the company policy any female who cannot return to her job within three months of delivery of her child is automatically terminated. No other disability is cause for such automatic termination. "For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." Aiello v. Hansen, 359 F. Supp. 792 [N. D. Cal. 1973].

We conclude, as a matter of law, that the maternity leave policy in effect in Defendant Company at the present time and since September 1970 in the respect in which it requires a female to return to work within three months of the date of delivery of her child, or six months from the beginning of her maternity leave, whichever date is earlier, or face termination of employment, is violative of Sec. 703, of Title VII of the Civil Rights Act of 1964, as amended, in that such policy discriminates against female employees on the basis of sex.

Because only this present policy is still in existence, injunctive relief as to this practice is appropriate at this time.

We further find that all prior company policies in effect since July 2, 1965, which compelled pregnant female employees to leave employment at a fixed period of pregnancy before delivery were likewise violative of the Act, and the company policy in effect since July 2, 1965 which denied reemployment because of pregnancy and maternity were violative of the Act. Because these practices have ended there is no need for injunctive relief, and the question of the intentional nature of the violation and the appropriate relief will be considered in a subsequent stage of these proceedings.

Some additional considerations must be weighed with respect to plaintiffs' claim that the Income Protection Plan of Defendant company is discriminatory to female employees. The Company provides its employees with a contributory insurance plan for continuation of income for a "long term illness", i.e. an illness requiring treatment by a doctor of eight or more calendar days which causes absence from work. Such "benefits are not payable for disability due to occupational injury or to sickness covered under Workmen's Compensation Insurance; for disability due to pregnancy; for a disability in excess of 104 weeks; or for a disability during which you were not treated by a physician licensed to practice medicine."

Pregnancy is the only disability, not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i.e. gout 19 to 1; the Merck Manual, 10th ed. 1961).

The brief of the United States Chamber of Commerce as amicus curiae cites cost of the program if pregnancy were included, as a justification for exclusion.

We must emphasize the distinction made by the Guidelines, § 1604.10(b) that it is "disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" which for job-related purposes are to be treated as temporary disabilities. They do not cover leave for child rearing, but only for job disability. No evidence has been presented to us by Defendant as to the average duration of pregnancy disability. Again, we have a difficult time in freeing ourselves from stereotype thinking. We note that the Defendant's policy for maternity leave prior to delivery has accommodated itself from a fixed number of months prior to delivery to the recognition that an employee may work prior to delivery as long as she is able to do the job. Return to work may be made as soon after

delivery as she is able to do the job. We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to show, and nothing in our general experience with life indicates that the job-related incidence of disability for pregnancy is any greater or any less than that for a prostatectomy.

The EEOC Guidelines provide, § 1604.9 Fringe Benefits, (e):

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

While cost may be a business purpose, and certainly to add pregnancy disability to the insurance program will cost more, it can only be a defense in a Title VII action where

> ". . . there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (footnotes omitted.) Robinson v. Lorillard Corporation, 444 F. 2d 791, 798 [4th Cir. 1971].

With respect to the argument of increased costs there is no statutory requirement that Defendant company offer any particular disability benefits, in any specific amount, or of any particular duration. The only requirement is that there be no inequality based on sex. Adjustments in the benefit plan to achieve equality are a recognized means of achieving that end. Rosen v. Public Service Electric Co. cit supra (p. 95); Hays v. Potlatch Forests, Inc., 465 F. 2d 1081 [8th Cir. 1972].

> "The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." Aiello v. Hansen, 359 F. Supp. 792, at p. 798 [N. D. Cal. 1973].

A final requirement for a finding of violation of Title VII is that the court must find that defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" in order to issue an injunction or to order such affirmative action as may be appropriate. While we are not now concerned with any question of relief in which the questions of back pay or reinstatement may be considered, certain continuing policies of defendant are subject to immediate injunctive relief, and require a finding of intentional action. Defendant has raised no question of intentional violation, except as to its defense of good faith reliance on administrative interpretation which we have found insufficient. The term "intentional" in this Act means that the Defendant intended to do what it did, not that there was a wilful and deliberate intention to violate the law.

> ". . . intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation of Sec. 706(g)." Kober v. Westinghouse Electric Corp., 408 F. 2d 240, 246 [3rd Cir. 1973].

We, therefore, find that the violations of Title VII of the Act herein charged were intentional within the terms of that statute.

We, therefore, conclude that as to the issues raised by Plaintiffs' Motion for Partial Summary Judgment, there is no genuine issue as to material fact and that summary judgment interlocutory in character should be entered on those issues.

Because the evidentiary materials show that at certain times subsequent to the effective date of the Act, or subsequent to the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practice, injunctive relief is not appropriate as to those practices. Kober v. Westinghouse Elec. Co., supra, p. 250.

As to continuing practices which violate Title VII preliminary injunctive relief at this time is appropriate.

The question of other affirmative relief for past actions is not now before us. The Court is mandated to issue "such affirmative relief as may be appropriate". *Kober*, cit supra. This will depend upon the evidence to be presented on the individual claims, which may be considered at the time of trial of the "equal pay" issue not here considered.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania
* * (Caption—72-169) * *

MEMORANDUM ORDER ON MOTION TO RECONSIDER

The Defendant Liberty Mutual Insurance Company has moved the court to reconsider that portion of its Order of January 9, 1974, that found that the Defendant's policy of requiring female employees to return to work within three months of delivery or be terminated and its policy of denying the benefits of the disability income protection plan to female employees for any disability related to pregnancy or childbirth are violations of Title VII of the Civil Rights Act of 1964.

Defendant brings to our attention the decision of the Northern District of Georgia in Newmon v. Delta Air Lines, Inc., Civil Action No. 15681, issued December 31, 1973 of which this court was unaware at the time of its January 9, 1974 order. We have considered that Opinion and its Findings which, in many parts are in complete accord with the Findings of this Court. However, we do disagree with the Finding of that court that pregnancy is not a "disability".

We do note that the decision in Newmon v. Delta Air Lines, Inc. was made after a consideration of a great deal of evidentiary material presented by both parties in that case concerning working conditions, the type of work performed, the preference of the woman, the accessibility of a hospital, and, of course, the possibility of complications to both mother and child in pregnancy cases. The court also considered whether or not the defendant Airlines maternity leave policy was "reasonably necessary to the normal operation of the airlines business".

The remainder of Defendant's motion continues the argument that it is impossible for Defendant to present any statistical material of the cost of extending disability benefits to pregnancy because no statistics are available. Whether such statistics are

available or not, the Defendant made no attempt to produce any such evidence before this court. The court cannot understand why the disability from performing work due to pregnancy or childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. For a half century or more in this country, and for over a century in European countries, these matters are decided in hundreds, if not thousands of cases daily.

Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." The Defendant presented absolutely no evidence to support this argument and as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex. The motion for reconsideration will be denied.

In its Order the court stated it would enjoin the continuance of practices which the court found to be in violation of Title VII. The Plaintiffs were invited to submit the form of the injunction order and the Defendant has filed Notice of Appeal and asked for stay of any injunctive order. Under these circumstances the court will withhold the issuance of the injunctive order and amend the Order previously issued under the provisions of Fed. R. Civ. P. 54(b), as follows:

And now this 20th day of February, 1974, it is directed that final judgment be entered in favor of Plaintiffs that Defendant's policy of requiring female employees to return to work within three months of delivery of a child or be terminated is in violation of the provisions of Title VII of the Civil Rights Act of

1964; that Defendant's policy of denying disability income protection plan benefits to female employees for disabilities related to pregnancies or childbirth are in violation of Title VII of the Civil Rights Act of 1964 and that it is expressly directed that Judgment be entered for the Plaintiffs upon these claims of Plaintiffs' Complaint; there being no just reason for delay.